minority registration or participation would otherwise be wiped out. Senate Report, *supra*, at 5-6.

One of the two triggers for section 5 coverage is set out in section 3(c) of the Act, 42 U.S.C. 1973a(c). That provision permits federal courts to order, as part of the remedy in a case finding violations of the Fourteenth or Fifteenth Amendments, that a jurisdiction be covered by the preclearance requirement. To the best of *amicus*'s knowledge, Escambia County, Florida, is one of only six jurisdictions in the entire United States where a federal court has ordered this extraordinary remedy. See *McMillian* v. *Escambia County*, 559 F. Supp. 720, 727 (N.D. Fla. 1983) (referring to the imposition of preclearance).

Nationwide, the Voting Rights Act has done much to eliminate the barriers to registration and participation previously faced by minority citizens. "More than a million black citizens were added to the voting rolls from 1965 to 1972. It is not surprising, therefore, that to many Americans, the Act is synonymous with achieving minority registration." Senate Report, *supra*, at 6. As this Court has noted, "the spread between black and white registration in several of the targeted Southern States [has] fallen to well below 10%." *Shaw* v. *Reno*, 509 U.S. 630, 640 (1993). Today, black registration rates nationwide are comparable to white registration rates: in 2004, 64.4% of black citizens were registered, compared with 67.9% of white citizens. U.S. Census Bureau, *Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004* (May 25, 2005), *available at* http://www.census.gov/population/www/socdemo/voting/cps2004.html (last visited Oct. 11, 2005).

2. Unfortunately, the Voting Rights Act has been less successful in enfranchising Florida's black citizens. Today, only 52.6% of black Floridians are registered to vote, compared with 64.4% of blacks nationwide. *Ibid.* Similarly, only 44.5% of black Floridians cast a ballot in the 2004

election, compared to 56.3% of black citizens of voting age nationwide. *Ibid.* This lower voting and registration rate for African Americans living in Florida reflects Florida's history of racial discrimination.

The courts below recognized the "abundance" of evidence regarding that history. See Pet. App. 159a. That history involves not only the provision at issue in this case, which clearly had its genesis in the desire to perpetuate an all-white electorate after the end of the Civil War, but also such other well-recognized stratagems as barring black voters from primaries, see *Miami Chronology: 1920-1940*, Miami Herald, Sept. 13, 2002, *available at* http://www.miami.com/mld/miamiherald/news/photos/4069508.htm (last visited Sept. 25, 2005) and poll taxes, see Alexander Keyssar, The Right To Vote 228-29 (2000).

The continued effects of Florida's long history of racial discrimination with regard to voting are visible today. Most dramatically, the 2000 presidential election displayed in stark relief Florida's continued difficulty with providing equal access to the voting booth for its African-American citizens. As the U.S. Commission on Civil Rights reported, the "disenfranchisement of Florida voters fell most harshly on the shoulders of African Americans," who were "nearly 10 times more likely than white voters to have their ballots rejected in the November 2000 election." U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election* (June 2001), *available at* http://www.usccr.gov/pubs/vote2000/report/main.htm (citation omitted) (last visited Oct. 11, 2005).

While not all of this discrimination was intentional, some surely was. On Election Day, "Florida Highway Patrol troopers conducted an unauthorized vehicle checkpoint within a few miles of a polling place in a predominately African American neighborhood," while other voters reported seeing state troopers in and around polling places. *Ibid.* Such behavior sends a threatening signal to populations of voters

who already have entrenched suspicions of law enforcement as a result of past discrimination.

Although Florida's rates of felon disenfranchisement are far higher than those of other states, see Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), *available at* http://www.hrw.org/reports98/vote/ (last visited Oct. 11, 2005), felon-disenfranchisement statutes are nonetheless a national problem meriting this Court's review. The magnitude of the problem is illustrated by the fact that in the 1996 presidential election, nearly 1.4 million black men nationwide were denied the right to vote because of such laws. *Ibid.* This significantly exceeds the number of black men (roughly 1.1 million) who were *enfranchised* by the passage of the Fifteenth Amendment in 1870. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* 17 (1975) (in 1870 there were approximately 1,083,484 black men in the United States over the age of 20).

Moreover, the continued disenfranchisement of large numbers of African-American citizens affects citizens other than the individual denied the right to vote. It also contributes to the dilution of minority voting power. For instance, African-American voters in Florida have rarely been able to elect black candidates: whereas 12.7% of Florida's voting-age population is black, only 4.3% of the state's elected officials are black. David A. Bositis, *Black Elected Officials: A Statistical Summary 2001*, Joint Ctr. for Political & Econ. Studies (2003), at 16 tbl.3, *available at* http://www.jointcenter.org/publications1/publication-PDFs/BEO-pdfs/2001-BEO.pdf (last visited Oct. 11, 2005).[4]

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[4] That racial disparities in offender disenfranchisement are not simply a southern problem is illustrated by cases such as *Farrakhan* v. *Washington*, 338 F.3d 1009 (CA9 2003), cert. denied, 125 S.Ct. 477 (2004), and *Muntaqim* v. *Coombe*, 366 F.3d 102 (CA2 2004), cert. denied, 125 S.Ct. 480 (2004), rehearing en banc granted, 396 F.3d 95 (CA2 2004), challenging the offender

II. THE PROFFERED JUSTIFICATIONS FOR LIFETIME FELON DISENFRANCHISEMENT LAWS ARE SO TENUOUS THAT THEY DO NOT SATISFY THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act prohibits the imposition by a State or political subdivision of "a voting *qualification* or prerequisite to voting or standard, practice, or procedure," if such imposition would "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. 1973(a) (emphasis added). The plain language of section 2 thus reaches felon disenfranchisement laws. See *Farrakhan* v. *Washington*, 338 F.3d 1009, 1016 (CA9 2003) ("Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.") (citation omitted) (emphasis in original), cert. denied, 125 S. Ct. 477 (2004).

Section 2 further directs courts to consider whether under "the totality of the circumstances," a challenged practice results in discrimination on account of race. 42 U.S.C. 1973(b). In the authoritative Senate Report

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disenfranchisement policies of Washington and New York, respectively. *Amicus* believes this Court appropriately denied certiorari in *Farrakhan*, which was correctly decided by the Ninth Circuit, and should grant certiorari here to make clear that offender disenfranchisement statutes are subject to attack under the VRA when they have a discriminatory result. This case may offer a better vehicle than *Muntaqim* for addressing the question. First, New York's law only disenfranchises currently incarcerated felons and parolees. The risk of discriminatory effects is far greater under Florida's lifetime disenfranchisement system, and therefore the question of whether the VRA applies to felon disenfranchisement laws is more starkly presented. Moreover, the justification for the state's policy is, for reasons we discuss, far more tenuous. Second, the unique procedural posture in which *Muntaqim* would come before this Court might preclude reaching the substantive issue.

accompanying the 1982 amendments that imposed this "results test," Congress identified a number of "typical factors" that may be relevant in assessing a section 2 claim.

Of particular salience to this case, Congress directed courts to consider "[w]hether the policy underlying the state or political subdivision's use of such voting qualification * * * is tenuous." Senate Report, *supra*, at 29. When a state's proffered justifications for using a practice that deprives minority citizens of the right to participate and to elect representatives of their choice are tenuous, this "casts the [state's] scheme in a dubious light," *Hendrix* v. *Joseph*, 559 F.2d 1265, 1269 (CA5 1977). Not only can the tenuousness of a state's articulated rationale be "circumstantial evidence that the system is motivated by discriminatory purposes," it is also relevant to the question whether the policy is so "unfair" that it fails section 2's totality of the circumstances test. *United States* v. *Marengo County*, 731 F.2d 1546, 1571 (CA11 1984).

The traditional justifications for lifetime felon disenfranchisement laws are worse than tenuous. Under contemporary constitutional doctrine, they are themselves constitutionally problematic. Whatever the state of the law at the time of *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), there has been a sea change since. That change is reflected in the fact that while twenty-eight states inflicted lifetime disenfranchisement at the time of *Richardson*, today only three states still deny the right to vote to all individuals who have completed their sentences. See The Sentencing Project, *Felony Disenfranchisement Laws in The United States* 3 (2005), *available at* http://www.sentencingproject.org/pdfs/1046.pdf (last visited October 11, 2005). Florida is thus an outlier relying, to the extent it tries to justify its policy at all, on outmoded and constitutionally dubious reasoning.

A. States May Not Disenfranchise Groups of Citizens on the Basis of the Policies or Candidates Those Voters May Support.

The most widely advanced basis for disenfranchising former offenders is that they lack the moral character to vote and, if re-enfranchised, might use the ballot box to oppose law-enforcement policies. See Fellner & Mauer, *supra*, at 1. Traditionally, supporters of lifetime felon disenfranchisement justified the practice by pointing to a now-discredited concern with preventing the expression of "anti-social" or "subversive" views. This "anti-social voter" justification is based on the assertion that an ex-felon's prior violation "raise[s] questions about [his] ability to vote responsibly." *Shepherd* v. *Trevino*, 575 F.2d 1110, 1115 (CA5 1978). The state is therefore justified in revoking the right of past offenders to vote to protect the "purity of the ballot box," *Washington* v. *State*, 75 Ala. 582, 585 (Ala. 1884) (warning of an "evil infection" and "the invasion of corruption" by the "unfit"), and to ensure that former offenders do not use their power to vote in ways contrary to societal interests. *Green* v. *Bd. of Elections*, 380 F.2d 445, 451-52 (CA2 1967), cert. denied, 389 U.S. 1048 (1968).

This argument – dubious already in its factual premise – is not a justification for denial of the basic right to vote. States in the late nineteenth century similarly justified their efforts to disenfranchise polygamists on the grounds that the state has the prerogative to "withdraw all political influence from those who are practically hostile" to prevailing social mores. *Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885); see also *Davis* v. *Beason*, 133 U.S. 333 (1890) (same).

Simply put, however, the Constitution no longer permits disenfranchisement on the basis of fear about how people will vote. "To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). See also Stephen Holmes & Cass R. Sunstein, The Cost of Rights:

Why Liberty Depends on Taxes 105 (1999). Because the right to vote is "vital to the maintenance of democratic institutions," a state cannot disenfranchise a sector of the population out of "a fear of the political views" of that political group. *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965) (citation omitted); see also *Dunn* v. *Blumstein*, 405 U.S. 330, 355 (1972) (state may not limit the vote to those with "a common interest"); *Cipriano* v. *City of Houma*, 395 U.S. 701, 705 (1969) ("differences of opinion" may not be the basis for excluding any group or person from the franchise).

Because the anti-social voter justification rests on the unconstitutional philosophy that states can disenfranchise voters based on imagined voting tendencies, Florida must find other non-tenuous justifications for its lifetime disenfranchisement law.[5]

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[5] The tenuousness of the anti-social voter justification is reinforced by the fact that even if former offenders were to vote as a bloc, they would achieve electoral success only if they could persuade a significant proportion of never-convicted voters to support their preferred candidates or issues. Under those circumstances, however, defenders of lifetime disenfranchisement need to explain why the preferences of a majority of the citizenry to change perhaps outdated or otherwise unwise criminal laws should not be respected.

Supporters of lifetime disenfranchisement laws also sometimes argue that because former offenders have violated the law, they have broken the "social contract" that binds all members of a society together, and, as a result, should lose the right to help determine society's political path. *Wesley* v. *Collins*, 791 F.2d 1255, 1261-62 (CA6 1986); Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559, 571 (2003) (quoting Sen. Mitch McConnell as arguing that "[s]tates have a significant interest in reserving the vote for those who have abided by the social contract. * * * Those who break our laws should not dilute the vote of law-abiding citizens.").

B. Punishment Is Not a Valid Justification for Lifetime Felon Disenfranchisement Laws.

Defenders of lifetime disenfranchisement laws have recently argued that revoking the right to vote is a valid "form of punishment." See, *e.g.*, Roger Clegg, *Who Should Vote?*, 6 Tex. Rev. L. & Pol. 159, 177 (2001); see also Frank Phillips, *Lawmakers Push to Ban Inmate Votes*, Boston Globe, June 28, 2000, at B1 (quoting Massachusetts House Minority Leader Francis Marini as suggesting that the loss of the vote "is part of the penalty"). Indeed, the court of appeals in this case suggested that Florida's disenfranchisement law was intended as a punitive device. *Johnson* v. *Bush*, 405 F.3d 1214, 1228 (CA11 2005) (en banc) ("Felon disenfranchisement laws are * * * a punitive device stemming from criminal law.").

That justification marks a shift in the rationale for disenfranchisement. This Court's decision in *Trop* v. *Dulles* presupposed that disenfranchisement laws represent a "*nonpenal* exercise of the power to regulate the franchise." 356 U.S. 86, 96-97 (1958) (emphasis added). It thought they were to be justified on the anti-social voter theory, or not at all. See *id.* at 97 n.22 (referring to *Davis* v. *Beason*, 133 U.S. 333 (1890), and *Murphy* v. *Ramsey*, 114 U.S. 15 (1885), in support of disenfranchisement laws). There is thus "little

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In fact, the "social contract" rationale ultimately collapses into either an argument that persons convicted of a crime will vote in ways that the state does not like, which is constitutionally illegitimate for the reasons *amicus* has just explained, or an argument that lifetime disenfranchisement constitutes an appropriate punishment. As the next section shows, that rationale is also illegitimate. Cf. John Locke, The Second Treatise of Government 8 (J.W. Gough rev. ed. 1976) (3d ed. 1698) (transgressions should only "be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like").

historical precedent for the argument that disenfranchisement is meant to be an additional punishment for the commission of a crime." Gary L. Reback, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 Stan. L. Rev. 845, 856-57 (1973). Now that the anti-social voter justification has become constitutionally suspect, Florida may very well be anxious to invent alternative justifications.

Even if there were historical support for the notion that lifetime disenfranchisement laws were intended to punish, that justification would nonetheless be tenuous because such laws serve no valid penological purpose. See *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (holding that a sanction is beyond the state's authority to inflict if it makes "no measurable contribution" to acceptable penal goals). Lifetime disenfranchisement laws cannot be legitimately regarded as a form of punishment because they do not promote any of the four traditional goals of punishment: rehabilitation, deterrence, incapacitation, and retribution. See *Ewing* v. *California*, 538 U.S. 11, 25 (2003) (listing the four standard justifications that might inform a state's sentencing scheme).

1. Lifetime felon disenfranchisement laws fail to rehabilitate ex-felons. Indeed, such laws are fundamentally premised on the belief that former offenders are unredeemable and will never be able to vote responsibly again. See Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753, 782 (2000); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 Harv. L. Rev. 1300, 1316 (1989).

In fact, the empirical evidence supports precisely the opposite conclusion. Re-enfranchising former offenders decreases recidivism rates. Christopher Uggen et al., *"Less Than the Average Citizen": Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, *in* After Crime and Punishment: Ex-Offender Reintegration and Desistance from

Crime 263 (Shadd Maruna & Russ Immarigeon eds. 2002). Empirical studies indicate that – even controlling for factors like criminal history, class, race, and gender – there is a statistical correlation between voting and lower rates of arrest, incarceration, and self-reported criminal behavior. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 195-96, 213 (2004). Just as prior empirical studies have demonstrated that ex-felons who enter stable work and family relationships are more likely to desist from future crime, John Laub et al., *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 Am. Soc. Rev. 225, 237 (1998); Robert Sampson & John Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609, 617-18 (1990), those who vote are far less likely to be arrested again than those who do not vote, Uggen & Manza, *Voting and Subsequent Crime and Arrest* at 204-05.

For many ex-felons, the restoration of the right to vote provides a clear marker of civic reintegration and is a key component of changing the former offender's identity and self-image, "from one capable of self-aggrandizing behavior that victimizes others, to one also capable of behavior that supports achievement of broader social causes." Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 Colum. Hum. Rts. L. Rev. 241, 262 (2004). Conversely, the refusal of the state to restore voting rights can stand as a major impediment to ex-felons who yearn to lead an upstanding life. See, *e.g.*, Uggen, "*Less Than the Average Citizen*," at 274-75 (recounting ex-felon's statement that losing the right to vote was "just like a little salt in the wound," and that he "would like to someday feel like a, quote, 'normal citizen,' a contributing member of society,"

but found it extremely difficult when he was reminded every election of his status as an ex-felon).[6]

While the act of casting a ballot is unlikely to be the sole factor in turning a former offender's life around, restoring an individual's right to vote is a critical component of encouraging a successful reintegration into society, and promoting healthy civic engagement among ex-felons and their communities alike.

2. Nor can disenfranchisement be justified as a deterrent of criminal behavior. It is unlikely that an individual who is not deterred by the prospect of imprisonment or fines will be dissuaded by the threat of losing his right to vote. Moreover, many individuals are unaware that permanent disenfranchisement is a consequence of felony conviction. Cf. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002) (noting that individuals need not be informed even when pleading guilty that disenfranchisement is a collateral consequence of conviction).

3. Lifetime disenfranchisement also bears little or no relation to incapacitation goals, except insofar as it perhaps

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[6] The idea that enfranchisement contributes to social responsibility has a long pedigree. See Matthew A. Crenson & Benjamin Ginsberg, Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public 66 (2002) (noting that during the civil rights movement, many members of the business community supported expanding voting rights for African Americans as a way of encouraging them to seek "to achieve their ends by voting rather than demonstrating"); Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts 253 (Da Capo 1970) (1853) (In the 1820 Massachusetts constitutional convention, one advocate of enfranchising laborers without property argued, "[b]y refusing this right to them, you array them against the laws; but give them the rights of citizens—mix them with the good part of society, and you disarm them.").

impedes the ability of an infinitesimally small group of ex-felons to commit voting-related crimes. Given that only a minuscule percentage of those affected by Florida's disenfranchisement laws were convicted of committing voting-related crimes, incapacitation cannot serve as more than a tenuous justification.

4. Finally, lifetime disenfranchisement provisions cannot be justified as appropriate retribution. Retributive theory demands that the punishment be proportional to the gravity of the defendant's conduct. Revoking an individual's right to vote for the rest of his life is such a severe response in proportion to many of the acts that constitute a felony in Florida that punishment cannot serve as a legitimate justification for lifetime disenfranchisement laws. See *Coker*, 433 U.S. at 592 (holding that a sanction is beyond the state's authority to inflict if it is "grossly out of proportion to the severity of the crime").

The severity of lifetime disenfranchisement is undisputed:

> [T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box * * * disinherited [, he] must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.

McLaughlin v. *City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

Yet this harsh response is felt by former offenders of every stripe in Florida: "a felon convicted of the lowest felony in Florida loses his right to vote for life, as does a serial murderer." Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 137 (2003). Not only murderers incarcerated for life lose their right to vote; so too can those convicted of writing a bad check, trespassing on commercial horticultural property, or merely accessing the internet

through a neighbor's wireless signal. See Fla. Stat. ch. 832.05(2) (2004) (making it a third-degree felony to issue a bad check for over $150 with knowledge of insufficient funds); Fla. Stat. ch. 810.09(2)(e) (2002) (making it a third-degree felony to trespass on commercial horticultural property); *Man Held in Theft of Wireless Web Access*, Miami Herald, July 8, 2005, at B6 (reporting that officials had charged a man with third-degree felony for connecting to the Internet through a neighbor's unsecured wireless signal pursuant to Fla. Stat. ch. 815.06 (2001)). Revoking a former offender's right to vote for life is so disproportionate to these kinds of transgressions that lifetime disenfranchisement laws cannot be defended on the ground that they represent a reasonable, proportional punitive measure. Indeed, the fact that only three states continue to deny the right to vote to all ex-offenders who have completed their sentences reflects the national consensus[7] that such laws are disproportionate. The magnitude and consistency of change since this Court's 1974 decision in *Richardson*, when twenty-eight states inflicted lifetime disenfranchisement, are even more pronounced than the sixteen-year shift that convinced this Court to prohibit the

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[7] On the international front, the United States is the only democracy that indefinitely disenfranchises criminals who have not committed voting-specific infractions. The supreme courts of Canada and South Africa recently issued decisions requiring their governments to permit even incarcerated citizens to vote. See *Sauve* v. *Canada*, [2002] 3 S.C.R. 519 (Can.); *August* v. *Electoral Comm'n* 1999 (3) SA 1 (CC) (S. Afr.). Countries such as France, Germany, and Greece disqualify only some classes of incarcerated offenders from voting, while other countries – including Australia, New Zealand, and Sri Lanka – limit the voting rights only of those serving sentences of a specified length. See *August*, *supra*, at 15 n.30. See also *Hirst* v. *The United Kingdom*, Application No. 74025/01 (Eur. Ct. Hum. Rts. Oct. 6, 2005) (holding that a general and automatic disenfranchisement of all convicted and incarcerated prisoners violates Article 3 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

executions of mentally retarded criminals under the Eighth Amendment. *Atkins* v. *Virginia*, 536 U.S. 304, 313-17 (2002).

C. The Tenuousness of the Asserted Justifications for Lifetime Disenfranchisement Laws Is Reinforced By the Significant Harms They Inflict on the Political Process.

Lifetime felon disenfranchisement laws do far more harm than good. As *amicus* has already noted, the empirical evidence suggests that by preventing citizensfrom fully reintegrating into society, such laws may increase recidivism rates. Just as important, lifetime disenfranchisement provisions may suppress voting among law-abiding citizens in communities disproportionately affected by the criminal justice system.

First, the enforcement of lifetime criminal disenfranchisement laws results in the purging of thousands of law-abiding citizens from voter rolls. Second, law-abiding individuals in communities disproportionately affected by the criminal justice system vote at reduced rates in states with lifetime disenfranchisement laws because they come to believe that their votes are less meaningful.

1. Official investigations of the purge of Florida's election rolls before the 2000 election confirm that thousands of law-abiding citizens were barred from voting because their names were similar to those on a sloppily generated list of convicted felons. U.S. Commission on Civil Rights, *Voting Irregularities*, *supra*. The U.S. Commission on Civil Rights conducted an extensive public investigation of voting irregularities in Florida during the 2000 election and uncovered disenfranchisement of law-abiding citizens that was "not isolated or episodic." *Id.* at ch. 9. For example, Miami-Dade County's purge list had a staggering 14.1% error rate, meaning that almost one out of every seven people on the list was purged in error. *Id.* at ch. 1. To make matters worse, "African Americans had a significantly greater chance

of being listed on Florida's mandated purge list," *id.* at ch. 9, a fact that led the Commission to conclude that Florida's use of voter purge lists "ha[d] a disproportionate impact on African Americans," *id.* at ch. 1. Restoring voting rights to former offenders would thus also protect the voting rights of thousands of law-abiding citizens caught in the net of Florida's flawed enforcement mechanism.

2. Even if Florida devised a flawless method of enforcement, its lifetime disenfranchisement law would still stifle voter participation in communities disproportionately affected by the criminal justice system. One recent empirical study found that lifetime disenfranchisement laws diminish voter turnout among law-abiding voters. See Aman McLeod et al., *The Locked Ballot Box*, 11 Va. J. Soc. Pol'y & L. 66 (2003). Notably, this effect could be traced primarily to communities with disproportionately high rates of former offenders among the population. *Id.* at 79.

Conversely, in states without lifetime disenfranchisement laws, communities with high concentrations of ex-felons voted at rates similar to those of non-affected communities, suggesting that disenfranchisement was the source of the dampening effect. *Ibid.* In all likelihood, when disenfranchisement significantly dilutes the vote in disproportionately affected neighborhoods, law-abiding citizens begin to feel ignored by political candidates, leading in turn to disillusionment with the political process and even lower rates of civic participation. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1293 (2004).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

THOMAS JOHNSON, *et al.*,
Petitioners,

v.

JEB BUSH, GOVERNOR OF FLORIDA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* THE NATIONAL BLACK POLICE ASSOCIATION, THE NATIONAL LATINO OFFICERS ASSOCIATION OF AMERICA, AND FORMER LAW-ENFORCEMENT OFFICIALS ZACHARY W. CARTER, KENDALL COFFEY, VERONICA F. COLEMAN-DAVIS, ERIC H. HOLDER, JR., WALTER C. HOLTON, JR., G. DOUGLAS JONES, WILMA A. LEWIS, J. BRAD PIGOTT, JAMES K. ROBINSON, HOWARD M. SHAPIRO, PAUL SHECHTMAN, SETH P. WAXMAN, AND WILLIAM D. WILMOTH, IN SUPPORT OF PETITIONERS

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Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir.), *cert. denied*, 125 S. Ct. 477 (2004) 5

Hunter v. Underwood, 471 U.S. 222 (1985) 3, 8

Johnson v. De Grandy, 512 U.S. 997 (1994) 4, 6

McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995) 17

McMillan v. Escambia County, 748 F.2d 1037 (5th Cir. 1984) 7

Oregon v. Mitchell, 400 U.S. 112 (1970) 15

Ratliff v. Beale, 20 So. 865 (Miss. 1896) 8

Richardson v. Ramirez, 418 U.S. 24 (1974) 8, 9

Thornburg v. Gingles, 478 U.S. 30 (1986) 4, 6

United States v. Armstrong, 517 U.S. 456 (1996) 3

United States v. K, 160 F. Supp. 2d 421 (E.D.N.Y. 2001) 19

United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984) 7

CONSTITUTION AND STATUTES

U.S. CONST. art. III, § 3, cl. 2 11

U.S. CONST. amend. VIII 16

U.S. CONST. amend. XIV 9, 18

U.S. CONST. amend. XV 9, 18

42 U.S.C. § 1973 ..... *passim*

Section 2 of the Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1965), *as amended*, Pub. L. No. 97-205, 96 Stat. 134 (1982), 42 U.S.C. § 1973 2

FLA. CONST. art. VI, § 4 (1968) ..... *passim*

FLA. CONST. art. XIV, § 2 (1868) 3

FLA. STAT. ANN. § 561.5101 (West 2005) 18

LEGISLATIVE MATERIALS

S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 ..... *passim*

MISCELLANEOUS

American Bar Association, *Standards for Criminal Justice 23-8.4: Voting Rights* (2d ed. 1983) 12

American Correctional Association, Resolution on the Restoration of Voting Rights (Jan. 14, 2004), *available at* http://www.aca.org/pastpresentfuture/Winter_2004_Resolutions.asp#15 13

Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).....17

JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998).....12

General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the ICCPR, CCPR/C/21/Rev.1/Add.7, Aug. 27, 1996, Annex V(1).....12

Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1973).....10, 11, 14, 16

Robert M. A. Johnson, *Message from the President — Collateral Consequences*, National District Attorneys Association (May/June 2001), *available at* http://www.ndaa-apri.org/ndaa/about/president_message_ may_june_ 2001.html.....13

MODEL PENAL CODE § 306.3 (2001).....12

Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989).....11

Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, in NATIONAL INSTITUTE OF JUSTICE'S SENTENCING & CORRECTIONS: ISSUES FOR THE 21ST CENTURY 5 (2000).....18, 19

Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).....8

Andrew L. Shapiro, *The Disenfranchised*, THE AMERICAN PROSPECT (Nov.-Dec. 1997) 12

Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 35 (Marc Mauer & Meda Chesney-Lind eds., 2002).....16

INTEREST OF *AMICI CURIAE*[1]

Amici are current and former law-enforcement officials, and their professional associations, who share an interest in seeing that permanent felony disenfranchisement laws that disproportionately deny minority citizens the right to vote can be challenged under the Voting Rights Act. *Amici* submit that, contrary to Respondents' assertion, Florida's "penal interests" are not well served by permanently disenfranchising ex-felons — including hundreds of thousands of African-American and Latino citizens who have served their sentences and are no longer imprisoned, on parole, or on probation. *Amicus* The National Black Police Association (NBPA) and *amicus* The National Latino Officers Association of America (NLOA) together represent more than 45,000 uniformed and civilian law-enforcement officers and employees at the city, state, and federal level. NBPA and NLOA are dedicated to promoting effective law enforcement and to building stronger bonds between minority law-enforcement officers and the communities they serve. The individual *amici* are primarily former federal prosecutors and have served in high-level law-enforcement positions ranging from United States Attorney to Solicitor General to Deputy Attorney General to General Counsel of the FBI.[2]

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[1] Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Counsel for the parties did not author the brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The individual *amici* are Zachary W. Carter, Kendall Coffey, Veronica F. Coleman-Davis, Eric H. Holder, Jr., Walter C. Holton, Jr., G. Douglas Jones, Wilma A. Lewis, J. Brad Pigott, James K. Robinson, Howard M. Shapiro, Paul Shechtman, Seth P. Waxman, and William D. Wilmoth.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the applicability of Section 2 of the Voting Rights Act (the "VRA" or the "Act")[3] to a provision of the Florida Constitution that permanently bars from voting *any* person who has a prior felony conviction.[4] There is today no more sweeping felony disenfranchisement law in the Nation.

Florida's law currently disenfranchises 5.2% of the State's adult population — more than 600,000 people who have served their full sentences, including not only imprisonment but also probation and parole. Significantly for purposes of analysis under the VRA, this exclusion falls disproportionately on minority citizens. Blacks are roughly 2.4 times as likely as non-blacks to suffer disenfranchisement, as 10.5% of black adults (approximately 167,000 persons), but only 4.4% of non-black adults, are deprived of the right to vote by virtue of being ex-felons.[5]

Florida's felony disenfranchisement provision was first inserted into the state constitution in 1868 to "keep[] blacks from voting" in the wake of their emancipation from slavery.[6] A century later, in 1968, Florida reenacted that constitutional provision almost verbatim: Both versions stated that no "person convicted of a felony . . . [shall] be

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[3] Pub. L. No. 89-110, 79 Stat. 437 (1965), *as amended*, Pub. L. No. 97-205, 96 Stat. 134 (1982), 42 U.S.C. § 1973.

[4] FLA. CONST. art. VI, § 4 (1968). Florida has a discretionary clemency process which can restore an individual ex-felon's voting rights; but it affects only a tiny fraction of ex-felons in any given year, and it disproportionately benefits whites. *See* Pet. App. 263a-270a, 361a-373a.

[5] *See* Pet. App. 256a, 296a-297a; *see also id.* at 259a-260a, 301a-302a, 310a.

[6] Pet. App. 159a, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002); *see id.* at 197a-199a, 305a; *see also id.* at 18a, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc).

qualified to vote . . . ."[7] But Florida offered no official explanation of why it reenacted a law that, for 100 years, had persistently disenfranchised African-Americans at much higher rates than whites.

Had Florida simply left the 1868 provision in place, this would be an easy case. Under this Court's unanimous precedent in *Hunter v. Underwood*,[8] the Constitution forbids any state law that was enacted "for the purpose of disfranchising blacks" and that continues to have "a discriminatory effect on blacks" — which the *Hunter* Court found to be the case in Alabama, where the challenged law rendered blacks "at least 1.7 times as likely as whites to suffer disfranchisement."[9]

But the court below treated Florida's 1968 reenactment of its felony disenfranchisement provision as having expunged the law's discriminatory intent.[10] The validity of that ruling — a question also presented by the Petition, but not addressed in this *amicus* brief — ultimately may not matter here if Petitioners can prevail under amended Section 2 of the Voting Rights Act. Congress amended Section 2 in 1982 precisely to free voting-rights plaintiffs from having to prove discriminatory intent when challenging a voting qualification or practice that has discriminatory effects. That Congress has allowed plaintiffs to prevail absent any

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[7] The 1868 law provided in part: "[N]or shall any person convicted of a felony be qualified to vote at any election unless restored to civil rights." FLA. CONST. OF 1868 art. XIV, § 2, Pet. App. 190a. The present law provides: "No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." FLA. CONST. art. VI, § 4 (1968), Pet. App. 192a.

[8] 471 U.S. 222 (1985).

[9] *United States v. Armstrong*, 517 U.S. 456, 467 (1996) (describing *Hunter*'s holding) (internal quotation marks omitted).

[10] *See* Pet. App. 17a-25a, 405 F.3d at 1223-26.

evidence of discriminatory intent, however, does not render irrelevant the State's asserted interest in a voting qualification or practice challenged under Section 2. Indeed, the plain text of amended Section 2 instructs courts to consider "the totality of circumstances,"[11] and the Senate Report accompanying the 1982 amendments listed, as one potentially probative circumstance, "whether the policy underlying the [State's] use of [the challenged practice] is *tenuous*."[12] The "tenuousness" factor prevents States from defending discriminatory voting practices by pointing to some seemingly race-neutral policy that is in fact flimsy when compared to the loss of the franchise.

In this litigation, Respondents have asserted that Florida's permanent disenfranchisement of ex-felons serves the State's "penal interests."[13] As this brief shows, there could hardly be a flimsier defense. *First*, historically, felony disenfranchisement laws have never been justified as a means for advancing a State's penal goals. *Second*, permanently disenfranchising ex-felons does not materially serve the traditional, legitimate penal interests of prevention, deterrence, or retribution — and it positively *disserves* the goal of rehabilitating ex-offenders.

The Eleventh Circuit erred by swallowing the State's mischaracterization of felony disenfranchisement as "a punitive device stemming from criminal law."[14] By contrast,

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[11] 42 U.S.C. § 1973(b).

[12] S. Rep. No. 97-417, at 29 (1982) (emphasis added) [hereinafter "S. Rep."], *reprinted in* 1982 U.S.C.C.A.N. 177, 207, *and quoted in Thornburg v. Gingles*, 478 U.S. 30, 37 (1986), *and Johnson v. De Grandy*, 512 U.S. 997, 1010 n.9 (1994).

[13] *E.g.*, Mem. of Law in Supp. of Defs.' Mot. for Summ. J., at 20.

[14] Pet. App. 29a, 405 F.3d at 1228.

the Ninth Circuit's decision in *Farrakhan v. Washington*[15] was based in part on plaintiffs' "evidence of the tenuous policy justifications for [Washington State's] felon disenfranchisement law."[16] Moreover, as the court below acknowledged, the holdings of the Ninth and Eleventh Circuits directly conflict on the key question presented here: whether Section 2 applies to felony disenfranchisement.[17] Because these decisions conflict on an important question of federal law that has not been, but should be, settled by this Court, the Petition should be granted.

REASONS FOR GRANTING THE PETITION

I. Under Section 2 of the Voting Rights Act, a "Voting Qualification" that Denies Minority Citizens Equal Access to the Ballot Must Be Justified by a Significant, Non-Tenuous State Interest.

Nothing in the text of the Voting Rights Act would exclude felony disenfranchisement laws from the Act's broad coverage. Section 2 of the VRA prohibits States from imposing or applying any "*voting qualification* or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group.[18] As amended in 1982, Section 2 focuses on results, and requires no proof of discriminatory intent.[19] In evaluating whether a given practice violates Section 2, courts must

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[15] 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir.), *cert. denied*, 125 S. Ct. 477 (2004).

[16] *Id.* at 1013; *see also id.* at 1015 (quoting the Senate Report on "tenuous" state policies); *id.* at 1020 n.15 (discussing plaintiffs' evidence of tenuousness).

[17] *See* Pet. App. 25a-26a, 405 F.3d at 1227.

[18] 42 U.S.C. § 1973(a) (emphasis added).

[19] *See Chisom v. Roemer*, 501 U.S. 380, 383 (1991).

inquire whether, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[20]

This Court has identified several objective factors that, under Section 2's "totality of circumstances" test, may support a claim of vote dilution or vote denial.[21] These factors (known as the "Senate factors") were derived from the Senate Report that accompanied the 1982 amendments to Section 2. They include (1) a history of official discrimination touching on the right to vote, (2) racially polarized voting, (3) practices that may enhance the opportunity for discrimination, (4) whether members of minority groups bear the effects of past discrimination, (5) racial appeals in campaigns, (6) the extent to which members of minority groups have been elected to public office, and — most significantly here — (7) whether "the policy underlying the State's . . . use of the contested practice or structure is tenuous."[22] There is no reason why these Senate factors cannot be applied in challenges to felony disenfranchisement laws. Given *amici*'s experience in law enforcement, we focus our discussion on the last factor — the tenuousness of the State's purported law-enforcement interest in permanently disenfranchising ex-felons.

This inquiry into whether the State's interest is tenuous plays a key role under Section 2. The greater the disparate impact the challenged voting practice has on a protected

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[20] 42 U.S.C. § 1973(b).

[21] *See, e.g., De Grandy*, 512 U.S. at 1010-11 & n.9 (citing S. Rep. at 28-29); *Gingles*, 478 U.S. at 44-45 (same).

[22] *Gingles*, 478 U.S.. at 45.